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Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,
Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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March 9, 1955

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

No Opinion Below

The decision of the Court of Appeals (R. 10) was entered without opinion.

Jurisdiction

The order and judgment of dismissal in the Court of Appeals (R. 11) was entered the same day as its decision, June 10, 1954. The petition was filed August 24, 1954 and was granted October 25, 1954. The jurisdiction of this

Questions Presented

1. Whether a notice of appeal in a civil action, received by a district court clerk by mail, with an appeal bond, one day before the last day of the 30 day period prescribed by 28 U. S. C. § 2107 for filing a notice of appeal, but withheld by him from filing until after the expiration of that period because the attorney who sent the notice of appeal had failed to enclose the filing fee prescribed by 28 U. S. C. § 1917 and had not responded until after expiration of the period to the clerk's return mail letter advising him of the withholding and of the fee requirement, was, nevertheless, filed in time under 28 U. S. C. § 2107 so as to bring the district court judgment before the Court of Appeals for review.

2. If the notice of appeal was not filed within the period prescribed by 28 U. S. C. § 2107 to bring the district court judgment before the Court of Appeals for review, whether this jurisdictional defect was cured by a subsequent order of the district court, obtained *ex parte* without any written motion or notice, directing the clerk to accord the notice of appeal a filing date *nunc pro tunc* as of the day it was received by him without the filing fee.

Statutes Involved

The pertinent provisions of 28 U. S. C. § 2107 (omitting paragraphs relating to proceedings in which the United States or an officer or agency thereof is a party and to admiralty and bankruptcy proceedings) are as follows:

Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U. S. C. § 1917 reads as follows:

District courts; fee on filing notice of or petition for appeal.

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

Statement

On April 22, 1954, the clerk of the United States District Court for the Northern District of New York, at Utica, entered a judgment (R. 3-4) in favor of declaratory plaintiffs in *Telechron, Inc. and General Electric Company* v. *Anthony J. Parissi*, Civil Action No. 3831. The district court opinion on the merits, rendered April 12, 1954, is reported at 120 F. Supp. 235.

On April 23, 1954, notice of the entry of the judgment on April 22, 1954, including a certified copy of the judgment endorsed by the clerk as filed on April 22, 1954, was served by mail on Parissi's attorneys, Andros & Smith of Albany, New York, by Whalen, McNamee, Creble & Nichols, also of Albany, attorneys for plaintiffs (R. 2-6).

On May 21, 1954, a Friday, (one day before the last day of the statutory 30-day period for appeal), the clerk received by mail a notice of appeal (R. 6) from the judgment of April 22, 1954, and an appeal bond, mailed the preceding day by Andros & Smith. The same day the clerk wrote to Andros & Smith stating that he was obliged to withhold filing and the sending of a copy of the notice of appeal to opposing counsel pending his receipt of the statutory filing fee of $5.00, which Andros & Smith had failed to enclose (R. 9).

On May 24, 1954, a Monday, Harry A. Smith, Esq., of Andros & Smith, forwarded the fee (R. 9). The fee was received by the clerk on May 25, 1954 (three days after expiration of the statutory period), and the notice of appeal and bond were then filed on that day, May 25, and copies sent to plaintiffs' attorneys, as shown by the clerk's entries in the district court docket (R. 1) and his endorsement on the back of the notice of appeal (R. 6).

Seeking to cure this filing out of time, Mr. Smith, on affidavit (R. 7-8) and without any written motion or prior notice to respondents, obtained *ex parte* an order of the district court (R. 7), dated May 27, 1954, directing that the notice of appeal be accorded a filing date *nunc pro tunc* as of May 21, 1954.

On May 28, 1954 this order was entered (R. 1). Pursuant to it the clerk made a notation in the district court

docket (R. 1), and in his endorsement on the back of the notice of appeal (R. 6), changing the recorded filing date of the notice of appeal from May 25, 1954 to May 21, 1954.

On June 3, 1954 a partial record was certified and transmitted to the Court of Appeals and respondents moved to dismiss the appeal for lack of jurisdiction (R. 10).

On June 10, 1954 the Court, after considering the briefs and hearing argument of the parties, dismissed the appeal (R. 10-11).

Summary of Argument

The Court of Appeals could not acquire jurisdiction over any appeal from the judgment of April 22, 1954 unless a notice of appeal was filed on or before May 22, 1954. The notice of appeal was not filed by the clerk until May 25, 1954 because he did not receive the statutory filing fee until that day. The clerk's receipt on May 21, 1954 of the notice of appeal and appeal bond, without the filing fee, did not constitute a filing. The clerk, who satisfied whatever obligation he may have had to promptly advise petitioner's attorney of the statutory filing fee requirement, was under no obligation to file the notice of appeal until the filing fee was paid. Rather, it was the obligation of the attorney to do all that the law required to be done in order to cause the notice of appeal to be filed in time. This he did not do.

To hold, in a civil case devoid of any exculpatory circumstances, that a clerk's receipt of a notice of appeal, without the statutory filing fee, is itself a filing and, consequently, that a clerk is under a duty to endorse, docket and treat a notice of appeal (and other papers having a statutory filing fee) as filed when received without the fee, as petitioner

contends, would in effect deprive fee-prescribing statutes of enforceability and place attainment of their legislative objectives at the whim of counsel.

Here no justification has been attempted for the almost 4 weeks delay in sending in the notice of appeal. The Court should not encourage by condonement an attorney's inexcusable delay and disregard of statutory provisions regulating procedures in the courts in which he practices.

The district court's *nunc pro tunc* order was a nullity. Since no notice of appeal was filed during the prescribed statutory period, the power of the Court of Appeals to review the judgment of April 22, 1954 expired when the period did. It could not be retroactively revived.

Argument

I. THE COURT OF APPEALS HAD NO POWER TO REVIEW THE JUDGMENT OF APRIL 22, 1954 UNLESS A NOTICE OF APPEAL WAS FILED ON OR BEFORE MAY 22, 1954.

The purpose of statutes limiting the period for appeal was stated in *Matton Co.* v. *Murphy,* 319 U. S. 412, 415 (1943) to be

> "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

Apart from exceptions not applicable here, 28 U. S. C. § 2107 prescribes that

> "no appeal shall bring any judgment . . . in an action . . . of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment . . ."

F. R. C. P. 73(a) is to the same effect.

The statute is peremptory. Failure to comply with its requirements deprives the Court of Appeals of jurisdiction to review. *George* v. *Victor Co.*, 293 U. S. 377 (1934). There is no right to appeal in the Federal courts save as it is granted or authorized by Congress. See *Heike* v. *United States*, 217 U. S. 423, 428 (1910); cf. *Ex parte Dante*, 228 U. S. 429, 432 (1913).

The district court judgment was entered on April 22, 1954 (R. 1). The prescribed 30 day period for filing a notice of appeal from that judgment, calculated in accordance with F. R. C. P. 6(a), thus expired on May 22, 1954.

II. NO NOTICE OF APPEAL FROM THE JUDGMENT OF APRIL 22, 1954 WAS FILED, OR SHOULD BE CONSIDERED TO HAVE BEEN FILED, UNTIL MAY 25, 1954.

The facts are clear and undisputed that no notice of appeal from the judgment of April 22, 1954 was endorsed, docketed or treated as filed by the clerk of the district court until May 25, 1954, 3 days after expiration of the prescribed statutory period for filing a notice of appeal.

However, petitioner urges that his notice of appeal should be considered to have been filed, and the appeal properly taken, as of May 21, 1954 when the clerk received the notice of appeal and appeal bond, but not the statutory filing fee which petitioner's attorney had failed to include. And petitioner contends that the clerk's failure to endorse and

docket the notice of appeal on May 21, 1954, despite the absence of the prescribed filing fee, "was an act of omission of his official duty" (P. Br. 8).

We may readily grant that the essential legal element of an effective filing is not necessarily determined by the presence or absence of a clerk's endorsement or docket entry. If petitioner's attorney had on May 21, 1954 done everything that the law required him to do in order to entitle him to have the notice of appeal filed by the clerk, any failure of the clerk to do his official duty by then endorsing and docketing the notice could not prevent the jurisdiction of the Court of Appeals from being properly invoked.

But did the clerk fail to do his official duty here? Did petitioner's attorney act in diligent compliance with the statutory requirements entitling him to have the notice of appeal filed by the clerk before May 25, 1954? The Court of Appeals, through its dismissal of the appeal, answered these questions in the negative.

The $5 filing fee prescribed by 28 U. S. C. § 1917 was first established by 43 Stat. 857, c. 204 (Feb. 11, 1925), providing for the payment of several $5 fees "upon" the rendering of different services by a district court clerk at various stages of the prosecution of an action. The stated purposes of 43 Stat. 857 were to eliminate a multitude of petty fees throughout the course of a litigation and to "simplify the work of the clerks of the United States district courts and at the same time be more understandable to members of the bar who practice in the Federal courts" (House Report 607, 68th Cong., 1st Session, on H. R. 5420 which became 43 Stat. 857), and "to save a lot of bookkeeping" (Debate on H. R. 5420, 65 Cong. Record 10,580). Indicative of the congressional awareness that

the only practical way to achieve these purposes was by payment of such fees at or before the time when the clerk's service was requested, is the provision in 43 Stat. 857 that it should not affect the Act of July 20, 1892, 27 Stat. 252, (now 28 U. S. C. § 1915), providing for the institution and prosecution of *in forma pauperis* actions without *prepayment* of fees.

The only reported opinion we have found having a square holding on the precise question of whether payment of the filing fee prescribed by § 1917 is necessary before a prospective appellant has the right to have his notice of appeal filed by the clerk of the district court is *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied *ibid.* In that case the Court, in dismissing an appeal for lack of jurisdiction for failure to cause a notice of appeal to be filed in time, stated (p. 705):

> "A motion to dismiss the appeal is before us.
>
> "Formal judgment was signed and entered in the docket of the District Court on November 8, 1951.
>
> "Notice of entry of the formal judgment was mailed to counsel for appellant on November 8, 1951.
>
> "On December 3, 1951 a notice of appeal from the formal judgment of November 8, 1951 was received by the Clerk of the District Court but was not accompanied by the filing fee of $5.00; hence, the notice of appeal was not accepted for filing and was not then filed. The required filing fee was received by the Clerk on December 12, 1951 and the notice of appeal was on said date duly filed . . .
>
> "No extension of time was given by the District Court pursuant to Rule 73(a), Fed. Rules Civ. Proc. 28 U. S. C. A.

> "Filing of notice of appeal within the required time is jurisdictional. The Clerk of the District Court was under no obligation to file the notice of appeal until the fee was paid. Appellant contends that the receipt and retention of the notice of appeal before the expiration of the thirty-day period constituted a filing. We are unable to agree.
>
> * * *
>
> ". . . In the instant case the failure to cause to be filed in time the notice of appeal was not a mere procedural irregularity; it was a jurisdictional defect . . .
>
> "Appeal dismissed." (Footnote omitted)

A petition for a writ of certiorari to review the holding of the court in the *Mondakota Case* was denied by this Court (No. 152, October Term 1952) at 344 U. S. 827 (1952).*

The case of *Turkett* v. *United States*, 76 F. Supp. 769 (N. D. N. Y. 1948) is also of significance here in indicating the judicially sanctioned right** of the clerk of the district court for the Northern District of New York (the court in which the present case arose) to require payment of filing fees under statutes such as 28 U. S. C. § 1917 before accepting a paper for filing, and the practical necessity for that

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*Another case approving the right of a clerk to refuse to file a notice of appeal until the statutory filing fee has been paid is *Smith* v. *Johnston*, 109 F. 2d 152, 154 (9 Cir. 1940). Compare *Steever* v. *Rickman*, 109 U. S. 74 (1883), *Anno* v. *United States*, 113 F. Supp. 673 (Ct. Cl. 1953), *Oil Well Supply Co.* v. *Wickwire*, 52 F. Supp. 921 (E. D. Ill. 1943), *Ommen* v. *Talcott*, 180 Fed. 925, 926-7 (S. D. N. Y. 1910).

**Rule 5 of the new Rules of the District Court, adverted to by petitioner (P. Br. 7, 12) as setting up a new practice, merely expresses the long-followed rule, exemplified by the *Turkett* case, that the clerk is not required to perform any service for which a fee is prescribed unless the fee is paid in advance.

requirement. In construing a statute (28 U. S. C. § 549, 1928 Ed.),* which also originated in 43 Stat. 857 and which related to the fee to be paid on the institution of an action in a district court, the court, after pointing out that the filing of a complaint was needed to institute the action, stated (p. 770):

> ". . . a prerequisite of the filing is the payment of the clerk's fees. Any other construction would open the door to actions without merit by irresponsible parties and make the clerk a credit man, whose accountability might result in his personal loss".

Clearly, in view of the *Turkett* holding and on principle, it cannot rightly be argued that the clerk's refusal in this case to file the notice of appeal without payment of the statutory filing fee, was "an act of omission of his official duty" (P. Br. 8). To rule that it was could result in the Government not receiving the fees it has prescribed (for papers other than notices of appeal as well) or in district court clerks suffering personal losses if called to account, and, in addition, would cause an increase in the bookkeeping and accounting work of the already heavily burdened clerks' offices, (with possible delay in the prompt and efficient administration of justice), contrary to the intendment of the filing fee statutes.

Even in a hard case, caused by a barren, formal technicality applied against a diligent but understandably

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*"*Fees of clerks of district courts; on institution of suit or proceeding.* Upon the institution of any suit or proceeding, whether by original process, removal, indictment, information or otherwise, there shall be paid by the party or parties so instituting such suit or proceeding, as fees of the clerk for all services to be performed by him in such case or proceeding, except as hereinafter provided, the sum of $5. (Feb. 11, 1925, c. 204, § 2, 43 Stat. 857)."

confused party, it might well not be in the ultimate interest of justice to inject such risks, burdens and confusion into the collection of fees, or uncertainty as to whether or not appellate jurisdiction has been properly invoked.

But this is not a case in which one's sense of fundamental justice is offended by the holding below that the appeal was not timely. This is a case of inexcusable neglect. Here no justification is attempted for the nearly four weeks' delay after entry of judgment (over five weeks' delay after the court's opinion) in sending in the notice of appeal. Nor is there any excuse for petitioner's attorney not to have known and followed the few explicit statutory provisions regulating the procedure in the court in which he practices. Certainly, it is no excuse (P. Br. 7) that the fee provision appeared in the Judicial Code, Title 28, instead of in the local court rules. And justification for the absence of the filing fee cannot be found in the fact that an appeal bond accompanied the notice of appeal (P. Br. 16). That bond is intended to cover costs in the Court of Appeals, such as the cost of printing the record, and specifically secures only the appellees, not the clerk of the district court.

It should also be noted that while the record is by no means clear on this point, it seems likely that the clerk's letter advising of the withholding from filing pending receipt of the statutory fee, arrived at the office of petitioner's attorney on the last day of the statutory period for appeal and in time to have the notice of appeal filed within that period, but that the attorney was absent from his office that day.*

*The clerk's letter is dated May 24th. Albany is less than 100 miles from Utica on the New York Central Railroad. It took only one day for each of the other papers in this record passing from one city to another. See e.g. Mr. Smith's letter to the clerk of May

Of interest here are the statements of the Court of Appeals for the Third Circuit in *Healy* v. *Pennsylvania R. Co.*, 181 F. 2d 934, 936 (3 Cir. 1950), cert. denied 340 U. S. 935 (1951), rehearing denied 341 U. S. 912 (1951):

> "We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to 'just, speedy, and inexpensive' litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. *It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct,** with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought."**

20th, received May 21st (R. 9); Mr. Smith's letter to the clerk of May 24th, received May 25th (R. 9, 1); Judge Foley's nunc pro tunc order signed by him in Albany on May 27th (R. 7), received and filed in Utica on May 28th (R. 1). Mr. Smith's affidavit on the nunc pro tunc motion states that he did not "receive" the clerk's letter until Monday, May 24th (R. 8). But this does not exclude the possibility that the letter arrived at his office on May 22nd in his absence. Granted that the 22nd was a Saturday, the fact remains that the clerk's office was open during business hours that day (F. R. C. P. 77(c)) and, furthermore, since the district court is "deemed always open for the purpose of filing any pleading or other proper paper" (F. R. C. P. 77(a)), the notice of appeal could have been filed that day at any time up to midnight by seeking out the clerk (or a judge, F. R. C. P. 5(e)) at his home and tendering the fee.

*Emphasis ours throughout this brief

**See also *Ray* v. *Morris*, 170 F. 2d 498, 499 (7 Cir. 1948); cf. *Yturbides Executors* v. *United States*, 22 How. (63 U. S.) 290 (1859).

The authorities urged by petitioner in support of his position that the notice of appeal should be treated as filed when received by the clerk on May 21, 1954 are inapposite or distinguishable.

None of the authorities cited at P. Br. 5-6 deals with the effect on the right to have a document filed of the failure to pay a prescribed statutory filing fee at the time the document is tendered for filing. They merely point out, for example, that the right cannot arise where the document is not delivered into the actual custody of the clerk, that "filing" implies that the document is accessible in the records of the court, and that it is the legal fact of filing, not a clerk's mark which controls. *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327 (1900), for example, cited at P. Br. 6, 13, dealt with the question of timely filing of a writ of error. The Court of Appeals for the Ninth Circuit had dismissed the appeal because the endorsement by the deputy clerk of the lower court merely stated that he had received a *copy* of the writ of error on a date within the prescribed time for taking the appeal, but did not state that the *original* writ of error had been received. This Court reversed, holding that it was the actual fact of filing which controlled and not the mere presence or absence of the endorsement on the original writ of error. An affidavit of the deputy clerk disclosed that the original writ of error had been presented and received with the copy, and had been treated by him as filed, although not endorsed by him because it was not his custom to endorse the original. Since the party seeking review had done in time all that was required of him, and the clerk's office had treated the original writ of error as in fact filed, the techical omission by the deputy clerk to endorse the

original writ of error was held not to be a jurisdictional defect.

In *Reynolds* v. *Imlay*, 118 F. 2d 53 (App. D. C. 1941), cited at P. Br. 7, there were conflicting statements in affidavits before the court regarding occurrences below relating to the time of tender to the clerk of a notice of appeal in an *in forma pauperis* action. The Court did not pass on the question of timely filing at all. It merely submitted the conflict of fact to the District Court under F. R. C. P. 75 (h), with the request that it settle the controversy and conform the record to the truth.

Petitioner argues (P. Br. 10-13) that the clerk *could* have filed the notice of appeal, even in the absence of the filing fee, and from this argument concludes that the failure of petitioner's attorney to make timely tender of that fee did not result in a jurisdictional defect. But the controlling question here is not whether the clerk *could* have filed the notice of appeal as a matter of grace, but whether petitioner's attorney had done all that the law required him to do to entitle him, as a matter or right, to have the clerk file the notice of appeal. Petitioner's abbreviated quotation (P. Br. 11) from 53 Corpus Juris 618 conveniently fails to include the following language at pp. 617-618 which immediately precedes that quoted by petitioner:

> ". . . valid filing . . . of an instrument is effected by delivering the instrument to the proper officer *and paying him the fees allowed by law; and it has been held that unless there is prepayment of such fees, effective recording cannot be predicated upon the delivery of an instrument to the proper officer for record . . . Further, where there is no prepayment of the required fee, the recording officer may refuse the paper to record.*"

Nor does the fact that the clerk *could* perhaps have filed the notice of appeal in the absence of the fee give him "arbitrary power, even to the extent of defeating appellate jurisdiction" (P. Br. 11). No clerk could validly preclude an effective filing of a notice of appeal timely received by him with the filing fee. But a prospective appellant's attorney *does* have the power to fail to make an effective filing. If appellate jurisdiction in this case can be said to have been "defeated", it was defeated by the initial delay of petitioner's attorney in attempting to take the appeal and his subsequent failure to observe the few simple statutory requirements in his belated attempt to do so.

Petitioner also argues (P. Br. 13-15) that affirmance of the Court of Appeals decision dismissing his attempted appeal would deny him impartial treatment under the law in view of four cases involving criminal appeals in which the courts held the appeals to be timely despite the fact that the clerk did not actually receive the filing fee within the statutory period. But in each of these cases, *Oddo* v. *United States*, 171 F. 2d 854 (2 Cir. 1949), cert. denied 337 U. S. 943 (1949), *Wallace* v. *United States*, 174 F. 2d 112 (8 Cir. 1949), cert. denied 337 U. S. 947 (1948), *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941), and *Williams* v. *United States*, 188 F. 2d 41 (App. D. C. 1951), the appellant, unlike petitioner here, was incarcerated and acting *pro se*. And in each of these cases the appellant, unlike petitioner's attorney here, did everything within his power to effect a timely filing of the appeal but was thwarted by the failure of an intermediate government official to do his duty. In the *Oddo* case the appellant had sent

mitted to the clerk for timely receipt. The Court of Appeals held that appellant should not be charged with the delay caused by prison routine in the transmission of the fee. The facts and holding of the *Wallace* case are substantially the same as those in the *Oddo* case. In the *Boykin* case appellant, who had handed his notice of appeal to the district judge within the time for appeal, was excused for failure to pay the filing fee in time because the judge had failed then to inform him of the filing fee requirement. And in the *Williams* case the notice of appeal was delivered by appellant to a United States marshal who could have transmitted it to the clerk in time for the clerk to notify appellant of the filing fee requirement, and receive the fee from him, within the time permitted for appeal. The Court held the appellant should not be charged with the marshal's delay. The doctrine of these cases has been distinguished, even in a criminal appeal, where the appellant was, as here, not acting *pro se* but was represented by counsel in the district. *Crow* v. *United States*, 203 F. 2d 670, 671n (9 Cir. 1953).

Finally, the intimation (P. Br. 9, 15) that F. R. C. P. 73(a), stating that failure of a party to take further steps to secure review *after filing* a notice of appeal shall not affect the validity of the appeal, is of aid to petitioner, clearly begs the question here, which is: Was the notice of appeal *filed* within the time prescribed by statute?

We believe it clear that it was not and that no proper basis exists in this case for deviation from the established rule.

III. THE *NUNC PRO TUNC* ORDER OF MAY 28, 1954 WAS A NULLITY.

The mere receipt by the clerk of the notice of appeal on May 21, 1954, without the statutory filing fee, not being in legal import a "filing" of the notice, and the period for appeal having expired on May 22nd without any filing of the notice, the subsequent *nunc pro tunc* order of May 28, 1954, and the changes in docket entry and endorsement made by the clerk pursuant to it, are clearly without legal significance and cannot cure the fatal jurisdictional defect created by the absence of a timely filing. As stated in *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258, 261 (1888):

> "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. *When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.*"

In accord: *Old Nick Williams Co.* v. *U. S.*, 215 U. S. 541 (1910).

The argument (P. Br. 8-10) that all the *nunc pro tunc* order did was to correct the record to conform to the facts turns on the contention that the notice should have been filed by the clerk on May 21, 1954, which is in itself an erroneous contention. The clerk's refusal to file the notice of appeal on May 21st *not* being "an act of omission of his official duty", the order is a nullity, even if considered from the standpoint of an attempted correction of an alleged

clerical mistake. For this reason F. R. C. P. 60(a)* and the case of *United States* v. *Todar,* 41 F. 2d 146 (7 Cir. 1930) are clearly distinguishable.

The court in the *Todar* case was dealing with 28 U. S. C. § 230, 1925 Ed. which required that an appeal be "applied for" in the court which gave the judgment, within three months after its rendition. Judgments had been entered on August 22, 1928. On November 19, 1928, there were filed in the clerk's office notices of appeal with proof of service, a motion for an extension of the time for filing bills of exceptions and assignments of errors, and an order of the court granting the motions. On December 11, 1928 another order was filed granting another 30-day extension, and on December 26, 1928 the bills of exceptions and assignments of error were filed. On January 14, 1929, an order was filed, "*nunc pro tunc* as of November 19, 1928", enlarging the time for docketing the appeals, and on March 30, 1929 an order was filed allowing appellant in each case an appeal, "*nunc pro tunc* as of November 19, 1928." The Court of Appeals held that the order of November 19, 1928 was a nullity because it was entered after commencement of a new term of court, and that since the bills of exceptions were thus not part of the record before it, the judgments below must be affirmed. Before so holding, it assumed that the order of March 30, 1929 "sufficiently manifests application for an allowance of the appeals by the District Court as of November 19, 1928" (p. 147). The Court of Appeals did not hold that the "*nunc pro tunc* order" validated an otherwise untimely appeal. Since it was the actual fact of allow-

*Note also that a portion of this Rule omitted in petitioner's quotation (P. Br. 9) states that the clerical mistakes referred to are [illegible] *other parts of the record* and errors

ance, rather than any formal order of allowance which controlled (*Brandies* v. *Cochran,* 105 U. S. 262, 1881), the Court of Appeals clearly believed, and in effect stated, that the District Judge had in fact allowed the appeal on November 19, 1928. His orders of November 19, December 11 and January 14, indicating a belief on his part that the appeal was in progress, corroborate this. The order of March 30, 1929 merely set the record straight; it was not a retroactive allowance of the appeal.

However, petitioner goes further than merely to urge that the significance of the *nunc pro tunc* order was to set the record straight. Adverting to F. R. C. P. 6(b)(2) and 60(b), and *Hill* v. *Hawes,* 320 U. S. 520 (1944), he implies (P. Br. 8-10) that somehow these Rules granted power to the district court to enter an order which could cure a previous substantive defect in jurisdiction. Neither the Rules nor the cited case lends support to petitioner's contention.

In the first place, petitioner *did not* proceed under F. R. C. P. 6(b)(2) or 60(b). These Rules require that application to the district court be made on motion. No motion, required to be in writing under F. R. C. P. 7(b)(1) and notice of which should be given to opposing counsel (cf. F. R. C. P. 6(d)), was made in this case. Petitioner's attorney proceeded *ex parte.* A similar *ex parte* procedure was held improper in *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.,* 193 F. 2d 951, 952 (9 Cir. 1952).

In the second place, petitioner *could not* have proceeded under F. R. C. P. 6(b)(2) or 60(b).

Rule 6(b) specifically states that the court "may not extend the time for taking any action under Rules . . . 73(a) . . . except to the extent and under the conditions stated

that a notice of appeal be filed within 30 days from the entry of a judgment in a civil action in which the United States or an officer or agency thereof is not a party. Despite any contention to the contrary (P. Br. 9), it seems clear that if whatever a prospective appellant needed to do to perfect the filing of that notice was not done until after the prescribed 30 days, then any subsequent "*nunc pro tunc*" order would in fact be extending the time for taking the appeal.

Rule 73(a) sets forth only one exception to its 30-day requirement:

> "upon a showing of excusable neglect *based on a failure of a party to learn of the entry of the judgment* the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed".

This exception is also the only one set forth in 28 U. S. C. § 2107, *supra*, p. 3.

The exception was added by the 1946 amendment to Rule 73(a) and included in 28 U. S. C. § 2107 (1948), *after* the decision of this court in *Hill* v. *Hawes*, 320 U. S. 520 (1944). In the *Hill* case, this Court, adverting to F. R. C. P. 60, had approved the action of a district court in vacating an already entered judgment and entering a new judgment in the same terms, in order to permit a new running of the time for appeal, on the ground that the appellant had failed to make a timely filing of his notice of appeal because he had relied on the requirement of F. R. C. P. 77(d) that the clerk should serve a notice of entry of the original judgment by mail on the losing party, and that the clerk had failed to do so. As the notes of the Advisory Committee on Rules

clearly state, the exception added by the 1946 amendment to F. R. C. P. 73(a) (and to F. R. C. P. 77(d)*) were intended to recognize only the one specific excuse for a party's failure to have his notice of appeal filed within the prescribed time.** Certainly, "the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged", *F. T. C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 211 (1952).

In this case petitioner was not eligible to seek an extension of his time since his notice of appeal, dated May 20, 1954, indicated prior, timely knowledge that the judgment had been entered, knowledge based upon receipt of a certified copy of the judgment of April 22, 1954 and notice of its entry on April 23, 1954, promptly served upon him by respondents' attorneys (R. 2-6).***

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*"Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a)."

**See also 6 Moore's Federal Practice (2d Ed. 1953) § 60.03, p. 4029: "in relation to the time for appeal to the court of appeals the district court's power is limited to extending the time for appeal, pursuant to Rule 73(a)". Cf. *Huff* v. *United States*, 192 F. 2d 911, 913-914 (5 Cir. 1951).

Professor Moore also states, § 60.03, p. 4028, "by virtue of the 1946 amendments to Rules 6(c), to 73(a) . . . and to 77(d), it is clear now that the doctrine of *Hill* v. *Hawes* has no vitality and that no provision in Rule 60(b) should be construed to give relief from a final judgment for any of the reasons advanced in *Hill* v. *Hawes*". In *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254, 255 (9 Cir. 1952) it was stated that " . . . certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal . . .". Cf. *Ackerman* v. *United States*, 340 U. S. 193 (1950).

***The Notes of the Advisory Committee on Rules to the 1946 amendment to Rule 73(a) specifically state that "The party in whose favor the judgment is rendered may, as provided in Rule 77, himself serve a formal notice on the defeated party of the entry of the judgment and thus avoid the possibility of any extension of time for appeal under the amendment of Rule 73(a)." A similar statement is made by the Advisory Committee in its note to the 1946 amendment to Rule 77(d).

Conclusion

For the foregoing reasons, the order and judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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